No. 24-1522 and all consolidated cases: Nos. 24-1624, 24-1626, 24-1627, 24-1628, 24-1631, 24-1634, 24-1685, and 24-2173.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF IOWA, ET AL.,
Petitioners,

v.

UNITED STATES SECURITIES & EXCHANGE COMMISSION,
Respondent,

DISTRICT OF COLUMBIA, ET AL.,
Intervenors.

On Petition for Review of an Order of the
Securities & Exchange Commission
(Release No 33-11275)
(Release No 34-99678)
(File No. S7-10-22)

AMICUS CURIAE BRIEF OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29, The Buckeye Institute states that all parties have given consent to file this amicus brief. Further, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The Buckeye Institute has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

INTEREST OF AMICUS CURIAE

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute seeks to protect individual liberties—especially those liberties guaranteed by the Constitution of the United States—against government overreach. Government overreach increasingly comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is the insulation of important public policy decisions from any political or judicial accountability. This is incompatible with the representative democracy guaranteed by the Constitution. In this case, the Securities and Exchange Commission exceeded its statutory authority and ignored key facts and issues to justify a regulatory scheme that American consumers do not want, which Congress has not authorized, and which harms Ohioans and Americans.

SUMMARY OF THE ARGUMENT

The Securities and Exchange Commission's (SEC) rule to require environmental, social, and governance (ESG) reporting would have a real and practical negative impact on American farmers and consumers across the country and would spawn further consequences that would only accelerate rising costs.

While respecting the rule of law, the Supreme Court appropriately considers the practical impact of its decisions and considers the economic and practical expertise of amici in the process. This Court should likewise consider the economic and practical experience of amicus curiae The Buckeye Institute in this case, as The Buckeye Institute has extensively examined the effects net-zero policies will have on Americans.

The SEC's Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024), rule (SEC Rule) would increase operational costs for farmers because they would be forced to buy expensive monitoring hardware and software and would have to hire ESG consultants to develop the reports necessary to be ESG compliant. Government regulations such as this pressure companies to stop buying from farms with "high" CO2 emissions and pressure banks to withhold loans, all of which consequences have befallen farmers in Europe. It is also hard for farms to limit their emissions by using electric vehicles (EVs) because they currently are impractical and inefficient for agricultural use. The

SEC Rule increases farm operational expenses even as net farm income has dramatically declined in the last two years. This increase in costs and reduction in capital accessibility could push farms that are already struggling to close their doors. For those who can continue, the additional expenses would be passed along to consumers who are already feeling their pocketbooks pinched with rising food prices.

The SEC Rule would coerce the implementation of carbon pricing and other net-zero policies pushed by the Biden administration—without congressional authorization. The Buckeye Institute analyzed the effect a basic carbon pricing methodology would have on American farmers and consumers. Carbon pricing is a policy tool that puts a price on carbon emissions to coerce industries into lowering their CO2 emissions. The Buckeye Institute found that a basic carbon pricing methodology would increase the annual operating costs of the farm by 34%. This increased operating cost would ultimately be passed onto the consumers by inflating their overall grocery bills by 15%, with some of America's favorite products increasing by over 50%, e.g. beef, cheese, and rice.

The European Union's (EU) adoption of ESG reporting and carbon pricing policies has yielded dramatic negative consequences for farmers across Europe due to the denial of bank loans, rising operational costs, and the proliferation of cheap imports. This has caused average food prices in Europe to rise by an astonishing

22%. Farmers across the EU, understandably, engaged in massive protests against these life-changing government policies. Europe provides an example of what the U.S. could face by adopting similar policies.

There is no clear congressional authority that justifies the new rule. The SEC Rule fails the major question doctrine as it attempts to use century-old legislation to wade into climate policy, which would force private entities to spend billions in compliance costs. Thus, the Court should hold unlawful and set aside the SEC Rule.

ARGUMENT

I. The Court should consider the practical impact of its actions, without neglecting the legal framework.

As farmers and American households attempt to make ends meet, the new SEC Rule could spell disaster for struggling farmers and consumers. If allowed, the SEC Rule would cost farmers billions of dollars to meet these new ESG reporting requirements, which will lead to soaring food prices.

On February 7, 2024, amicus curiae The Buckeye Institute prepared a deep dive analysis of the impact of ESG rules on farmers and food consumers. Trevor Lewis & M. Ankith Reddy, *Net-Zero Climate-Control Policies Will Fail the Farm* (2024)[1] (Net-Zero Report). This is precisely the type of analysis that properly "inform[s] the jurisprudence in various cases." Liliana M. Garces et al., *The U.S. Supreme Court's*

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[1] https://www.buckeyeinstitute.org/library/docLib/2024-02-07-Net-Zero-Climate-Control-Policies-Will-Fail-the-Farm-policy-report.pdf.

Use of Non-Legal Sources and Amicus Curiae Briefs in Fisher v. University of Texas*,* 73 J.C. & U.L. 167, 170 (2018). Buckeye's report and related publications have been viewed over 2,600 times.[2] And it has been referenced by RealClear Energy, Fox Business, Kansas Natural Resource Coalition, and RFD TV, among others. Bonner Russell Cohen, *Joe Biden's Net-Zero Agenda Down on the Farm and at the Supermarket,* RealClear Energy (Feb. 21, 2024)[3]; Thomas Catenacci, *'Costly' ESG standards, climate policies will ultimately reduce food and energy supplies: report*, Fox Business (Feb. 7, 2024)[4]; Tracy Barton, *Re: Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, Docket No. EPA–HQ– OW–2021–0736,* Kansas Natural Resource Coalition (Mar. 25, 2024)[5]; Roger A. McEowen, *Firm to Farm: Top Ag Law & Tax Issues for 2024,* RFD TV (Feb. 20, 2024)[6].

As explained by this brief, Buckeye's analysis concludes that rules—like the SEC's ESG rule—if allowed to stand, will place an enormous burden on already struggling farmers and will trigger much higher food prices, just at a time when

[2] According to The Buckeye Institute's internal analytics.
[3] https://www.realclearenergy.org/articles/2024/02/21/joe_bidens_net-zero_agenda_spells_trouble_down_on_the_farm_and_at_the_supermarket_1013441.html.
[4] https://www.foxbusiness.com/politics/costly-esg-standards-climate-policies-will-ultimately-reduce-food-and-energy-supplies-report.
[5] https://americanstewards.us/wp-content/uploads/2024/03/KNRC-EPA-HQ-OW-2021-0736-0713_attachment_1.pdf.
[6] https://www.rfdtv.com/firm-to-farm/firm-to-farm-top-ag-law-tax-issues-for-2024.

inflation has already battered consumers, especially in their grocery bills.

II. The SEC Rule will hurt farmers and increase food prices.

A. The SEC Rule would increase farm operational costs, diminish sales, and reduce access to capital.

United States farmers feed not only the U.S. but also the world. Keith Good, *2022 U.S. Ag Exports Highest on Record, Focus on Corn, Soybeans and Wheat*, Farm Policy News (May 7, 2023)[7]. At the same time, the typical family farmer is often reputed to be "land rich but cash poor." *Broaddus v. U.S. Army Corps of Engineers*, 380 F.3d 162, 172 (4th Cir. 2004); Radley Buxton, *Land rich but cash poor: Profitability through real estate*, AG Proud (Sept. 19, 2022)[8] ("Many ag producers find they are cash poor and land rich."). Indeed, the average farm-level net cash farm income was projected at $41,700 in 2023. *USDA Forecasts Sharpest Decline in U.S. Farm Income in History*, U.S. Senate Comm. on Agric., Nutrition, & Forestry (Sept. 7, 2023)[9]. So even small cost increases have an outsized impact on farm profitability and the resulting cost of food. And, "[a]ccording to the USDA, there are 1,798,439 small family farms in the United States. Small family farms account for 88% of all U.S. farms." *Facts About Small Business: Family Farm*

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[7] https://farmpolicynews.illinois.edu/2023/05/2022-u-s-ag-exports-highest-on-record-focus-on-soybeans-corn-and-wheat/.

[8] https://www.agproud.com/articles/55814-land-rich-but-cash-poor-profitability-through-real-estate.

[9] https://www.agriculture.senate.gov/newsroom/minority-blog/usda-forecasts-sharpest-decline-in-us-farm-income-in-history.

Ownership, U.S. Small Bus. Admin. (Aug. 10, 2023)[10]. Significantly, the number of farms with female producers is 1,139,675; African-American producers is 35,470; Hispanic, Latino producers is 86,278; and Asian producers is 18,338. *Id.*

Ohio is a microcosm of the U.S. agricultural economy, and its farmers are representative of national farmers. Food and agriculture make up the largest part of Ohio's economy, contributing over $100 billion annually and making up 14% of the jobs in the state. Dusty Sonnenberg, *The Big 10 of Ohio Agriculture,* Ohio's Country Journal (Apr. 19, 2022)[11]. As such, it provides a good case study for the impact of the SEC Rule on farmers and consumers nationwide.

Agriculture is one of the most fossil-fuel-dependent industries in the world. *Food Systems Account for at Least 15% of All Fossil Fuels,* Global Alliance for the Future of Food[12]. This may surprise many urbanites and suburbanites. But farmers rely heavily on diesel fuel to run tractors and other farming equipment and propane to power heated barns and grain dryers. Perhaps less obviously, nitrogen fertilizers, weed killers, and bug sprays are synthesized from natural gas and oil byproducts. Net-Zero Report, *supra*, at 7. Of course, without these resources, U.S. farms would no longer be able to feed the United States and the world.

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[10] Statisticshttps://advocacy.sba.gov/2023/08/10/facts-about-small-business-family-farm-ownership-statistics/.
[11] https://ocj.com/2022/04/the-big-10-of-ohio-agriculture/.
[12] https://story.futureoffood.org/power-shift/ (last visited June 11, 2024).

The SEC Rule would require mandatory ESG disclosure for publicly traded companies, requiring them to report their emissions from farm to table. Under the rule, companies would have to disclose the "actual and potential material impacts of any identified climate-related risks," including any material impacts on suppliers. 89 Fed. Reg. at 21,674. This would require farmers to purchase expensive monitoring software and hire ESG consultants just to help them quantify their emissions. As of 2018, nearly 70% of farmers were still using pen, paper, and non-computerized tools that would require updating to more modern technology to measure their emissions. ZeroHedge, *New ESG Rules are Hurting American Farmers*, Oil Price.com (July 2, 2022)[13]. Farmers who would need to adopt technology like farm management software are projected to pay an additional $1,200 annually in software costs. Nina Sparling, *US Farm Management Software Market to Reach $1.62bn – Report*, AgFunder Network Partners (Apr. 4, 2018)[14]. As most farmers spend less than $5,000 annually on technology, a 24% cost increase on that item alone is significant. *Id.* Further, hiring a single ESG consultant could cost each farmer a minimum of $25,000, with prices increasing with the scale of their operation. Rick Brundrett, *Serious business: How ESG mandates can hurt small SC firms*, The Nerve (May 12,

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[13] https://oilprice.com/Energy/Energy-General/New-ESG-Rules-Are-Hurting-American-Farmers.html.
[14] https://agfundernews.com/farm-management-software-market-report.

2022)[15]. These monitoring tools would result in increased annual overhead costs for farmers of at least $26,200, not to mention the upfront expenses required to purchase computers and other hardware necessary to run the software needed to ensure compliance. This is an enormous cut into the $41,700 average annual farmer profits. U.S. Senate Comm. on Agric., Nutrition, & Forestry, *supra*. That number will be shocking to urbanites and suburbanites taking our farmers for granted, but farmers work hard for their money, and we need to treat them right.

To compound the issue, net farm income has dramatically declined in the last two years. The U.S. Department of Agriculture has forecasted net farm income in 2024 at $116 billion, down nearly $40 billion from 2023, which itself was a decrease of $30 billion from 2022. Karen Braun, *US farm income set for biggest plunge in 18 years as prices cool way off*, Reuters (Feb. 14, 2024)[16]. In the last five years, over 140,000 farms have closed, and acres operated by farms declined by over 20 million acres, about the size of Maine. Daniel Munch, *Over 140,000 Farms lost in 5 years,* American Farm Bureau Fed'n (Mar. 7, 2024)[17]. Increased regulations, rising supply costs, available labor, and weather disasters have caused many family farms to

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[15] https://www.thenerve.org/serious_business_how_esg_mandates_can_hurt_small_sc_firms.

[16] https://www.reuters.com/markets/commodities/us-farm-income-set-biggest-plunge-18-years-prices-cool-way-off-2024-02-14/.

[17] https://www.fb.org/market-intel/over-140-000-farms-lost-in-5-years.

become unprofitable. *New Census Shows Alarming Loss of Family Farms,* American Farm Bureau Fed'n (Feb. 13, 2024)[18]. Increased farm operation expenses to track emissions would only further exacerbate declining income and put additional strain on farmers—and no doubt closing some (as has happened in Europe).

Fertilizer costs—an obvious component of farming costs—are going up, at least in part because of government regulations. Already facing rising expenditures due to the rising natural gas and energy prices, the fertilizer manufacturing industry is now looking at almost $7 billion in compliance costs from the Biden administration's thirteen European-style regulations on chemical producers. *Snapshot: Anticipated Regulation Burden/Costs Facing the Chemical Sector*, American Chemical Council (Sept. 20, 2023)[19]. At the top of the list is the SEC's Rule requiring ESG reporting, which will cost the industry an estimated $2.4 billion. *Id*. U.S. chemical companies' total revenue for 2022 amounted to $614.2 billion, a significant decline from 2015 when they posted revenues of $820 billion. *Revenue of the United States chemical industry from 2005 to 2022*, Statista (May 14, 2024)[20]. As chemical companies' revenue shrinks, the chemical companies will pass along rising expenses through

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[18] https://www.fb.org/news-release/new-census-shows-alarming-loss-of-family-farm.
[19] https://www.americanchemistry.com/chemistry-in-america/chemistry-creates-america-competes/resources/snapshot-anticipated-regulation-burden-costs-facing-the-chemical-sector.
[20] https://www.statista.com/statistics/302075/revenue-of-us-chemical-industry/.

increased fertilizer prices, at a time when the price of nitrogen fertilizers is already spiking. In 2021, nitrogen fertilizer prices soared up to 235% due to elevated global demand, surging natural gas prices, and the closure of two major European fertilizer plants. *Fertilizer prices spike in leading U.S. market in late 2021, just ahead of 2022 planting season,* U.S. Dep't of Agric. Econ. Rsch. Serv. (Feb. 9, 2022)[21]; Patrick Knight, *Major Fertilizer Plant Closures in Europe Instil Price Rise and Threat to Food Supply*, Chemanalyst (Sept. 17, 2021)[22]. The U.S. Department of Agriculture estimated that this fertilizer price increase has increased farmers' operational costs for growing corn and wheat by 35% and 36%, respectively. U.S. Dep't of Agric., *Impacts and Repercussions of Price Increases on the Global Fertilizer Market*, Foreign Agric. Serv.[23].

Although the rate of inflation has slowed since 2021, the price increases caused by that inflation have not abated. As of April 2024, food and fertilizer prices have not returned to pre-2021 levels. *Consumer Price Index for All Urban Consumers: Food in U.S. City Average,* FRED[24]. Implementation of the SEC Rule mandating ESG reporting would only exacerbate rising fertilizer and agrochemical prices and

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[21] https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=103194.
[22] https://www.chemanalyst.com/NewsAndDeals/NewsDetails/major-fertilizer-plant-closures-in-europe-instil-price-rise-and-threat-to-food-supply-7754.
[23] https://fas.usda.gov/sites/default/files/2022-09/IATR%20Fertlizer%20Final.pdf (last visited June 11, 2024).
[24]https://fred.stlouisfed.org/series/CPIUFDNS (last visited May. 23, 2024).

inflame farm operational costs.

Other consequences of the rule likely would cause farms with "high" CO_2 emissions rates to go under as their sales decrease and capital becomes harder to acquire all while their overhead increases. Large companies that feel pressured by the SEC Rule to improve their "ESG scores" may well stop purchasing from farms with "high" CO_2 emission rates. Net-Zero Report, *supra*, at 25. Likewise, food processors and restaurant groups—who are forced into the SEC Rule's disclosure mandates—will be pressured to deal exclusively with farmers who meet the SEC's ESG targets. *Id*. at 26. Banks—also under governmental reporting mandates—may well withhold loans from farmers who do not adopt the government's preferred practices, as has already happened in the EU. *See* Vincent Gauthier, *How banks can move towards net zero agriculture portfolios,* Env't Defense Fund (Feb. 24, 2022)[25]; Virginia Furness, *UK farmers hungry for climate finance but banks want more data,* Capital Monitor (Jan. 25, 2022)[26]. This would further pressure farmers to comply or risk diminishing buyers and capital, further destabilizing food security and magnifying costs for American consumers already struggling with the largest increase in food prices in over 40 years. Steve Morris, *Sticker Shock at the grocery*

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[25] https://blogs.edf.org/growingreturns/2022/02/24/banks-net-zero-agriculture-portfolios/.

[26] https://capitalmonitor.ai/factor/environmental/uk-farmers-hungry-for-climate-finance-but-banks-want-more-data/.

store? Inflation wasn't the only reason food prices increased, U.S. Gov. Accountability Office (Apr. 11, 2023)[27]. With rising overhead costs, having access to capital becomes even more vital to cash-poor farmers as their net incomes rapidly decrease.

Another impediment to farmers lowering "high" ESG scores is the impracticality of transitioning to the administration's preference for electric farm vehicles. The Inflation Reduction Act has encouraged—through regulatory rulemaking—a national shift to EVs. However, electric vehicle technology is ill-suited for farm equipment. Farm vehicles are not compact cars, they are tractors, planters, combines, windrowers, harvesters, and balers. Electric vehicles are heavier due to the weight of the batteries, which causes soil damage, reduces speed, and consumes more energy. J Sitompul et al., *Optimization Study on the Design of Utility Tractor Powered by Electric Battery* 1 (2019)[28]; Oscar Lagnelöv et al., *Impact of Lowered Vehicle Weight of Electric Autonomous Tractors in a Systems Perspective*, Science Direct[29]. Additionally, EV batteries drain faster in extreme temperatures. Kyle Stock, *A heat wave will cook your EV's battery, if you let it,* L.A. Times (July 12, 2023)[30].

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[27] https://www.gao.gov/blog/sticker-shock-grocery-store-inflation-wasnt-only-reason-food-prices-increased.
[28] https://iopscience.iop.org/article/10.1088/1755-1315/355/1/012058/pdf.
[29] https://www.sciencedirect.com/science/article/pii/S2772375522001204 (last visited June 11, 2024).
[30] https://www.latimes.com/business/story/2023-07-13/how-a-heat-wave-will-hurt-your-ev-battery.

Water damage from rain can further prematurely kill an EV battery, with replacements costing from $5,000 up to $15,000. *Marine Safety Alert: Saltwater intrusion causes damage to electric vehicle batteries*, U.S. Coast Guard News (Feb. 6, 2023)[31]; *The real costs of driving and insuring your electric vehicle,* USAA (Aug. 30, 2023)[32]. Since EV repairs can cost up to 25% more than standard combustion vehicles, insurance companies have started to increase premiums on EVs by 25% to account for this. David LaChance, *CCC report: Repair costs, turnaround times higher for EVs,* Repairer Driven News (July 12, 2022)[33]; Dillon Leovic, *How Much Does Electric Car Insurance Cost?*, ValuePenguin (June 1, 2023)[34]. The increased cost and inefficiency of EVs have made them impractical for agricultural use, limiting farmers' ability to reduce motorized farm equipment CO2 emissions.

Overall, coercing farmers to adopt net-zero policies will increase costs for already struggling farmers, as has already occurred in Europe.

B. Adopting Net-zero policies due to ESG monitoring would greatly increase household grocery bills.

The Buckeye Institute's economic model shows that ESG monitoring will

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[31] https://www.news.uscg.mil/maritime-commons/Article/3443768/marine-safety-alert-saltwater-intrusion-causes-damage-to-electric-vehicle-batte/.
[32] https://www.usaa.com/inet/wc/advice-auto-cost-driving-insuring-electric-vehicle.
[33] https://www.repairerdrivennews.com/2022/07/12/ccc-report-repair-costs-turnaround-times-higher-for-evs/.
[34] https://www.valuepenguin.com/how-having-electric-car-affects-your-auto-insurance-rates.

increase the average American household grocery bill by $1,330/year. Net-Zero Report, *supra*, at 8. To those in the top ten percent ($191,406 annual household income) that is not much. But to the average American household (two children, $70,000 annual income), those reliant on fixed income from social security (average yearly income from social security is $22,860), and those at the poverty level ($31,200 for a family of four)—many of them already struggling to pay rent or a mortgage, a car payment, utilities, and other necessities—it is real money. *Fact Sheet*, Social Security Admin.[35]; U.S. Dep't of Health & Human Serv., *Poverty Guidelines*, ASPE[36].

Even without a mandate for farmers to reduce CO2 emissions, forcing measurement of CO2 emissions induces action on what is being measured. Reporting is generally a form of coercion and will put pressure on farmers in relation to their ESG score. The SEC Rule would likely result in furthering the Biden administration's policies designed to meet net-zero carbon emission pledges under the Paris Climate Accords. The Buckeye Institute designed a model of a farm to determine the economic costs that a basic carbon pricing methodology would have on American farmers and households. Carbon pricing is a policy tool that puts a price

[35] https://www.ssa.gov/news/press/factsheets/basicfact-alt.pdf (last visited June 11, 2024).
[36] https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last visited June 11, 2024).

on carbon emissions to coerce industries into lowering their CO_2 emissions. *See What is Carbon Pricing?*, Carbon Pricing Leadership Coalition[37].

The Buckeye Institute based its farm model on an American corn farm with an average size of 725 acres and a yield of 172 bushels per acre. Net-Zero Report, *supra*, at 28 (citation omitted). To determine operating costs, Buckeye assumed 1.25 lbs. of nitrogen fertilizer would be required per bushel of corn, for a total farm fertilizer usage of 97.4 tons based on a study published by Louisiana State University in 2021. *Id*. (citing Rasel Parvej et al., *Corn Nitrogen Management*, AgCenter (Mar. 19, 2021)[38]). In total, this resulted in a fertilizer cost of $109,000 for the hypothetical 725-acre farm. *Id*.

Relying on a study by Iowa State University, The Buckeye Institute estimated diesel fuel usage at 6 gallons of fuel per acre for a conventional till farm and 2.5 gallons for a no-till[39] farm. Net-Zero Report, *supra*, at 28 (citing Gary Schnitkey et al., *Nitrogen Fertilizer Prices Stabilize at High Levels in Spring 2023*, farmdoc Daily

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[37]https://www.carbonpricingleadership.org/what#:~:text=Carbon%20pricing%20is%20an%20approach,of%20emitting%20on%20to%20emitters (last visited June 11, 2024).

[38] https://www.lsuagcenter.com/articles/page1616180617871.

[39] No-till farming is a technique that plants crops without tilling, that is, turning over the top layer of soil to ready the field for new crops, but no-till farming has its own cons, including increased usage of herbicides and increased equipment costs. *The Pros and Cons of No-Till Farming*, CropCare, https://cropcareequipment.com/blog/no-till-farming-pros-cons/#:~:text=The%20use%20of%20herbicides%20might,incorporated%20back%20into%20the%20soil (last visited June 11, 2024).

(June 13, 2023)[40]). This results in a conventional till farm using 4,350 gallons of fuel and no-till farms using 1,813 gallons. As reported by the U.S. Energy Information Administration, Buckeye used an average diesel price of $3.25 per gallon over the last decade to check against inherent price volatility, resulting in diesel costs of $14,137.50 for a conventional till farm and $5,892.25 for a no-till farm. *Id.* at 29.

The model farm reduced crop moisture content by 5% using a propane-powered grain dryer—over 80% of all grain dryers in America are propane-powered. *Id.* (citation omitted). The Buckeye Institute used the Propane Education and Research Council's publicly available tool to estimate that 12,900 gallons of propane would be required. *Id.* (citation omitted). Using the average propane price from October 2022 to March 2023, Buckeye valued a total cost of $34,572. *Id.* (citation omitted).

The Buckeye Institute also estimated carbon dioxide emissions on the model farm from fertilizer, diesel, and propane. Buckeye used a report published by the Royal Society to estimate that producing one metric ton of androgynous ammonia, the purest form of nitrogen fertilizer, produces 1.6 metric tons (tonnes) of CO2 emissions. *Id.* (citing Bill David et al., *Ammonia: zero-carbon fertiliser fuel and energy store* (2020)). Buckeye used the U.S. Energy Information Administration's fuel emissions estimates of 5.75 KG of CO2 per gallon of propane and 10.19 KG of

[40] https://farmdocdaily.illinois.edu/2023/06/nitrogen-fertilizer-prices-stabilize-at-high-levels-in-spring-2023.html.

CO_2 per gallon of diesel to estimate its model farm's propane and diesel fuel emissions. *Id*. (citation omitted). Total CO_2 emissions from fertilizer and propane, were 155.9 and 148.4 tonnes, respectively. *Id.* With CO_2 emissions from diesel fuel being 44.3 tonnes for a conventional till farm and 18.47 tonnes for a no-till farm. *Id.*

With the ESG-reporting requirements in place, The Buckeye Institute presumed that it would ultimately lead to monetized agricultural emissions and assumed a carbon pricing would use the widely accepted social cost of carbon metric, with a price of $185 per tonne. Buckeye assumed that carbon pricing would not be collected like traditional carbon taxes but instead would likely price the total value of emissions reduced and place a private carbon fee on Scope 3 emitters. Scope 3 emitters are indirect greenhouse gas emissions stemming from activities like supply chains, transportation, and product use, beyond an organization's direct control. Mark Segal, *SEC Chair Says Climate Disclosure Rule Feedback Pushes Back on Scope 3 Reporting as Less Developed, Unreliable*, ESGtoday (Sept. 28, 2023)[41]. Farms will be expected to pay this fee either by investing in net-zero infrastructure, adopting new farming practices, or buying carbon emissions offsets. Net-Zero Report, *supra*, at 30.

The model farm in the scenario would normally spend $109,000 on fertilizer in

[41] https://www.esgtoday.com/sec-chair-says-climate-disclosure-rule-feedback-pushes-back-on-scope-3-reporting-as-less-developed-unreliable/.

a year, but due to the carbon pricing, the price would be raised by $29,000, a roughly 27% increase. *Id*. at 36. Carbon pricing on propane would add $27,000, representing a nearly 40% increase. *Id*. Diesel fuel costs would increase by 58% due to the carbon pricing, costing an additional $8,195.50 for a conventional farm or just over $3,400 for a no-till farm. Overall, carbon pricing obligations would cost the model farm nearly $65,000 per year to offset or defray the costs of CO2 emissions—a 34% increase in annual farm operating expenses. *Id.* at 32, 36.

Compounding the issue, these additional costs on farmers would likely be passed along to consumers. The Buckeye Institute used the Consumer Expenditure Survey to find that the average American household spends $8,320 on groceries per year. *Id*. at 30. Buckeye also used data from the University of Michigan's Center for Sustainability (UMCS) to estimate that the total carbon emissions for an average American household is 48 tons per year. *Id*. (citing *Carbon Footprint Factsheet*, Ctr. for Sustainable Systems, Univ. of Mich.[42]). UMCS reported that 10–30% of a household's annual emissions come from their groceries' supply chain. Ctr. for Sustainable Systems, Univ. of Mich., *supra.* Buckeye took the midpoint of that estimate, 15% of total emissions, to find that a typical household's emissions from food is 7.2 tons of CO2 equivalent (CO2e). Net-Zero Report, *supra*, at 30. The

[42] https://css.umich.edu/publications/factsheets/sustainability-indicators/carbon-footprint-factsheet.

Bureau of Labor Statistics and the U.S. Department of Agriculture track the monthly average price of meats, produce, grains, and dairy products, which reflect typical American consumption habits. *Average Retail Food and Energy Prices, U.S. City Average and West Region*, U.S. Bureau of Labor Statistics[43]; *Announcement of Class and Component Prices,* U.S. Dep't of Agric. (Nov. 1, 2023)[44]. The Buckeye Institute used Carboncloud's Climatehub, a Swedish carbon emissions database that tracks CO2e emissions from food products in grocery stores, to estimate the carbon emissions of the following grocery items for which there is current Bureau of Labor Statistics and Department of Agriculture pricing data: rice, spaghetti, flour, bread, American cheese, cheddar cheese, milk, potatoes, oranges, bananas, lemons, strawberries, sugar, coffee, beef, bacon, and eggs. Net-Zero Report, *supra*, at 30. Buckeye assumed these items reflect a typical American weekly grocery list. *Id.* at 31.

The Buckeye Institute's analysis concluded that carbon pricing on farmers would increase the average grocery bill by $110 a month, $1,330 annually, which is a 15% increase. *Id.* at 37. Based on the data, the largest increase would be in American cheese and beef—which would experience a 78% and 70% increase respectively. *Id.*

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[43] https://www.bls.gov/regions/mid-atlantic/data/averageretailfoodandenergyprices_usandwest_table.htm (last visited Nov. 2, 2023).
[44] https://www.ams.usda.gov/mnreports/dymclassprices.pdf.

at 38. Other products would see similar spikes in retail price: Bananas would rise by 59%, rice would increase by 56%, strawberries and sugar would both rise by over 40%, and chicken would increase by 39%. *Id.*

Item	Price Per Lb.	Emission Costs	Total Price Per Lb.	Percent Increase
American Cheese	$4.73	$3.70	$8.43	78%
Bananas	$0.63	$0.37	$1.00	59%
Beef	$5.26	$3.70	$8.96	70%
Bread	$2.54	$0.19	$2.72	7%
Butter	$3.13	$0.74	$3.87	24%
Chicken	$1.90	$0.74	$2.64	39%
Coffee	$6.09	$0.82	$6.91	13%
Dozen Eggs	$2.04	$0.74	$2.78	36%
Flour	$0.57	$0.18	$0.75	32%
Milk	$3.93	$0.37	$4.30	9%
Oranges	$1.62	$0.04	$1.67	3%
Pork	$6.50	$1.85	$8.35	28%
Potatoes	$1.09	$0.24	$1.34	22%
Rice	$1.00	$0.56	$1.55	56%
Spaghetti	$1.40	$0.19	$1.59	13%
Strawberries	$2.61	$1.22	$3.83	47%
Sugar	$0.95	$0.41	$1.36	22%

This is on top of the largest increase in food prices that American families have experienced in 40 years at nearly 11% due to already swelling farm operational expenses. Morris, *supra*.

ESG reporting requirements and carbon pricing would place massive burdens on American farmers and families during a period of rapidly dropping net farm income and rising food costs. It would require farmers and families to stretch already limited

resources. The SEC Rule, while not mandating compliance with net-zero policies, does coerce companies to comply with the Biden administration's goals relating to carbon and other emissions. These companies and banks who have adopted these governmental goals may well refuse to work with farms that have governmentally designated "high" CO2 emissions, as has already been witnessed in Europe.

C. The European Union provides an example of the consequences that ESG reporting and carbon pricing can have on agriculture.

The EU provides a chilling example of what the U.S. could realistically experience should ESG reporting become mandated through the SEC Rule. The EU has required ESG reporting and instituted programs to limit carbon emissions, all of which have caused private action from banks and companies along with member states that have their own initiatives to meet net-zero goals. This has strained the agricultural industry and other associated industries such as chemical companies that produce nitrogen fertilizer and other agrochemicals. Increased costs and regulations imposed upon EU farmers have resulted in a drastic increase in cheaper non-EU goods, which are unburdened by the EU's ESG requirements.

In 2003, the EU introduced a cap-and-trade program known as the EU Emissions Trading Scheme (ETS) to create a market for carbon emissions. Under the program, the EU creates and allocates allowances or "credits" to member nations. The total number of credits represents the maximum emissions the European economy is permitted to emit in the year. Starting in January 2021, ETS Phase IV was

implemented, which reduced credit allowances by 2.2% annually. This has resulted in the price of ETS credits tripling in 2021 from $30 to $90, and credits are projected to reach $137.90 by 2030. *EU Carbon Permits,* Trading Economics[45]; Net-Zero Report, *supra*, at 11. Faced with rising costs, European electric companies have had to increase the price of both residential and industrial power, which rose 131% and 59%, respectively, between January 2021 and January 2022. *Electricity price statistics,* Eurostat[46]; Benjamin Wehrman, *What German households pay for electricity,* Clean Energy Wire (Jan. 16, 2023)[47].

The German chemical fertilizer industry was hit especially hard as a result of the ETS price increase. In an attempt to mitigate the issue, German firms responded by investing $650 billion to relocate operations to the United States. Net-Zero Report, *supra*, at 12. The EU responded by levying the world's first carbon tariff in 2023, the Carbon Border Adjustment Mechanism, in an attempt to prevent companies from shipping cheaper U.S.-produced fertilizer back to Europe. Mitchell Beer, *Europe Launches World's First Carbon Border Adjustment Rule,* Energy Mix (Oct. 9,

[45] https://tradingeconomics.com/commodity/carbon (last visited November 15, 2023).
[46] https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Electricity_price_statistics#Electricity_prices_for_non-household_consumers (last visited November 1, 2023).
[47] https://www.cleanenergywire.org/factsheets/what-german-households-pay-electricity.

2023)[48]; *Carbon Border Adjustment Mechanism,* European Comm'n[49]. However, this simply raises prices that European farmers and households have to pay for fertilizer, increasing farm operational costs, and, ultimately, food prices. Net-Zero Report, *supra*, at 12.

Although EU farmers are not yet required to participate in ETS Phase IV, they have not escaped from Europe's climate-control policies nor the impact from them. Several EU countries and industries are forcing farms to cut back their emissions to meet national and privately backed climate goals. European banks have begun withholding loans from farmers with "high" CO2 emissions, drying up valuable credit available to farmers. *Dutch gov't to buy out farmers to reduce livestock emissions,* Al Jazeera English (May 20, 2023)[50]; Furness, *supra*. In May 2023, the EU approved the Netherlands' plan to pay $1.6 billion and use eminent domain to acquire farms and livestock to reduce emissions. *EU okays $1.61 billion for Dutch government to buy out farmers, reduce nitrogen,* Reuters (May 3, 2023)[51]. Of course, eliminating farms means eliminating food production on those farms. In a world of

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[48] https://www.theenergymix.com/europe-launches-worlds-first-carbon-border-adjustment-rule/.
[49] https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en (last visited November 3, 2023).
[50] https://taxation-customs.ec.europa.eu/carbon-border-adjustment-mechanism_en.
[51] https://www.reuters.com/world/europe/eu-okays-161-bln-dutch-govt-buy-out-farmers-reduce-nitrogen-2023-05-02/.

global food insecurity, *see A global food crisis*, World Food Programme[52], that throws out the baby with the bathwater—hardly a desirable outcome.

Besides destroying Dutch farms directly via eminent domain, in 2023, the Netherlands announced that it would shut down gas production at the Groningen fields in October 2023, which has increased costs to manufacture nitrogen fertilizer and other agricultural chemicals. *Netherlands to end Groningen Gas production by Oct 1*, Reuters (June 23, 2023)[53]. Belgium also had a plan to limit emissions from nitrogen fertilizers. Susannah Savage, *Aggro-culture: Farmers' protest brings Brussels' EU Quarter to a standstill,* Politico (Mar. 3, 2023)[54].

Since the start of ETS Phase IV (January 2021-December 2022), the cost of farm fertilizers and soil improvers increased by 49%. *EU Agricultural Prices Continued to Rise in Q2 2022,* Eurostat (Sept. 30, 2022)[55]. The price of farm products like grains, oils, fruits, and eggs rose 42% in response. *Id*. Over the same time, average food prices increased by 22% in Europe. *Agriculture and Rural Development*,

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[52] https://www.wfp.org/global-hunger-crisis (last visited June 11, 2024).
[53] https://www.reuters.com/business/energy/netherlands-end-groningen-gas-production-by-oct-1-2023-06-23/.
[54] https://www.politico.eu/article/belgium-farmer-protests-brussels-nitrogen-emissions/.
[55] https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220930-3#:~:text=In%20every%20Member%20State%2C%20the,and%20Hungary%20(%2B43%25).

European Comm'n[56]. This caused 2022 European food imports to increase by 32% and the EU to raise its high-quality beef import quota with the United States. *European Union: US Beef Imports into EU High Quality Beef Quota Increased in 2022*, U.S. Dep't of Agric. (Mar. 1, 2023)[57]; *Good performance of EU agri-food trade in 2022 despite challenges*, European Comm'n (April 13, 2023)[58]. Less expensive food imports have been undercutting European farmers in part because they do not have to meet the same standards and regulations. Raf Casert, *Frustrated farmers are rebelling against EU rules. The far right is stroking the flames*, AP (Apr. 18, 2024)[59].

European farmers have grown increasingly frustrated because of the climate-change policies, denial of bank loans, rising operational costs, and cheap imports. As a result, farmers have been protesting across the EU for months. In February 2024, Brussels, the headquarters of the EU, reported protests that saw 900 tractors enter the city to block off traffic to the European Council building. Sylvain Plazy et al., *Protesting farmers spray Brussels police with liquid manure near EU's base in*

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[56] https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20220930-3 (last visited Nov. 16, 2023).
[57] https://fas.usda.gov/data/european-union-us-beef-imports-eu-high-quality-beef-quota-increased-2022.
[58] https://agriculture.ec.europa.eu/news/good-performance-eu-agri-food-trade-2022-despite-challenges-2023-04-13_en.
[59] https://apnews.com/article/europe-democracy-farmers-protest-green-deal-elections-a0278919b2fe47c7476c0c56ccf4850b.

a new display of power, AP (Feb. 26, 2024)[60]. And "Spain, the Netherlands and Bulgaria have been hit by protests in recent weeks." *Id*. Other tractor convoys across the EU have blockaded ports and major roads, and in France, protesters tried to storm a government building. Casert, *supra*. These are "some of the most severe farm protests in half a century." *Id.*

Europe's commitment to its net-zero climate-change policies and ESG reporting agenda provides a forecast of what consequences the U.S. might face with the SEC Rule's ESG reporting requirements. Even though EU farmers were not required to participate in ETS Phase IV, they still felt the impact from the program and from ESG reporting. Banks withheld loans from farms with "high" CO2 emissions, restricting capital to farmers who were already experiencing rising operational costs due to increased regulations, reporting requirements, and rising prices for products such as fertilizer. Fertilizer prices rose due to the ETS credits tripling in price in addition to member nation policies restricting gas production and the use of nitrogen fertilizer, rationalizing these actions as an attempt to reduce CO2 emissions. Carbon pricing and ESG reporting have had a devastating impact on European farmers and consumers as food prices soar and farmers are pushed to the brink. There is every reason to believe that the SEC Rule will trigger similar negative impacts on

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[60] https://apnews.com/article/european-union-farmers-protests-brussels-agriculture-ministers-c97ce9a135b74e8668ef5cdeec292f68.

American farmers and households.

III. The SEC Rule is so invasive and impactful that it goes beyond the SEC's authority and violates the major questions doctrine.

The SEC Rule will have a large and invasive impact on the American economy, as it will require billions spent in hardware, software, consultant fees, manhours, and additional expenses in order to meet the ESG reporting requirement. The SEC relies on the Securities Act of 1933 (Securities Act) and the Securities Exchange Act of 1934 (Exchange Act) in order to adopt this rule. However, those statutes do not give the SEC authority to mandate ESG reporting and, in effect, require millions of publicly traded companies and downstream farmers to each spend thousands on the equipment and tools necessary to develop such reports. It is the SEC's attempt to regulate and govern environmental policy in the United States.

The SEC Rule violates the major questions doctrine. While the parties and other amici will no doubt address this issue in detail, it is important to see how the foregoing economic and practical impact analysis fits into the major questions doctrine analysis.

In *West Virginia v. Env't Protection Agency*, Justice Gorsuch's concurring opinion lays out the test for the major questions doctrine. 597 U.S. 697, 742 (2022) (Gorsuch, J., concurring). Justice Gorsuch states that the doctrine applies when an agency claims power to resolve a matter of great political importance. *Id.* at 743 (Gorsuch, J., concurring). The burden then falls on the agency to point to clear

congressional authorization when it seeks to regulate a significant portion of the American economy or require billions to be spent by private persons or entities. *Id.* at 744 (Gorsuch, J., concurring). The SEC Rule will require billions to be spent on compliance by private entities. In 2022, ESG-related reporting expenses reached $8.4 billion. Net-Zero Report, *supra*, at 25. This rule will have large and dramatic consequences for farmers and the American household as a result of increased farm operational costs—which will ultimately be passed along to consumers—causing food prices to surge even further than that already caused by dramatic inflation for the past few years. The economic and societal impact on farmers and consumers certainly effectively regulates "a significant portion of the American economy." *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (citation omitted).

And the underlying purpose is undeniably to enact a preferred "climate policy" without going through Congress. Neither the Securities Act nor the Exchange Act provide explicit authorization for mandating ESG reports or permit the SEC to create climate policy. "A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *Id.* at 735. In the end, it is hard to argue that the intent of the regulation and the impact on Americans are not of "great political significance." *Id.* at 743 (Gorsuch, J., concurring) (citation omitted).

In determining if Congress has given the agency the express authority to enact

such overarching regulations, the language of the statute must be clear. Chief Justice Roberts states in the majority opinion that the court is reluctant to read ambiguity into the text, stating, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 723. Justice Gorsuch, in his concurrence in *West Virginia,* additionally states that courts may examine the age and focus of the statute to determine if Congress made an explicit grant of authority. *Id.* at 747 (Gorsuch, J., concurring). Adding that, "skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise." *Id.* at 748 (Gorsuch, J., concurring).

The SEC is attempting to use nearly century-old legislation to create new expanses to its power, creating costly reporting requirements, and lacks any clear congressional backing. The SEC fails to satisfy the major questions doctrine.

CONCLUSION

For the foregoing reasons, this Court should hold unlawful and set aside the rule.

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CERTIFICATE OF COMPLIANCE

Federal Rules of Appellate Procedure Appendix 6 1.

1. This document complies with the word limit of Fed. R. App. Rule 29(a)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,315 words.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing amicus brief was served on all counsel of record via the Court's electronic filing system this 24th day of June 2024.

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